Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(F)-58–10 OF 2017(P) AND 01(F)-59–11 OF 2017(P)
RICHARD MALANJUM CHIEF JUSTICE, ZAHARAH IBRAHIM CJ (MALAYA), AZAHAR MOHAMED, BALIA YUSOF AND ZAWAWI SALLEH FCJJ
8 MARCH 2019

Constitutional Law — Attorney General ('AG') — Extent of discretion — Whether AG had absolute discretion to refuse or give consent under s 9(1) of the Government Proceedings Act 1956 — Whether AG's exercise of discretion judicially reviewable — Whether AG public officer under Federal Constitution — Whether AG no longer considered as sole guardian of public interest — Whether courts now more willing to review exercise of discretionary power whether derived from statute or prerogative power — Whether House of Lords decision in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 moved courts from deciding whether prerogative powers existed to deciding if they were being carried out lawfully — Whether principle in Gouriet v Union of Post Office Workers [1978] AC 435 that AG's exercise of prerogative powers could not be judicially reviewed was no longer good law

The central issue in the two appeals herein — which were against two separate decisions of the Court of Appeal ('COA') — was whether the decision of the attorney general ('AG') to grant or refuse his consent under s 9 of the Government Proceedings Act 1956 ('the GPA') in respect of two trust proceedings was justiciable and reviewable by the courts. In the first appeal ('Appeal No 58'), a testator had willed funds and lands to trustees under a public charitable trust to build, inter alia, a pagoda for worshippers of a particular Buddhist deity ('the deity') so that they could carry out their religious rites. When, after many years, nothing was done by the trustees to carry out the testator's wishes and all funds that were allocated for that purpose were spent, the association representing the followers of the deity sought public funding to build the pagoda. As interested donors wanted the association to become a trustee of the funds to ensure the project was well-managed, the association sought the AG's consent under s 9(1) of the GPA to its proposed application to the High Court to be made a trustee in addition to or in replacement of the existing trustees of the trust. The AG refused to give his consent. The respondent sought leave of court to file proceedings to quash the AG's refusal and order him to grant the consent. The AG objected to the leave application

on the ground his refusal was non-justiciable. The High Court disagreed with the AG and granted the association leave to file for judicial review. The COA upheld the decision. Both the Courts held that the AG did not have absolute discretion to refuse his consent as the matter was not only non-criminal but also involved public interest and left the association without any recourse or remedy if the AG refused to give his consent.

In the second appeal ('Appeal No 59'), a piece of land which was subject to a perpetual religious and charitable trust for the joint benefit of Burmese and Thai communities in Penang was, with the court's sanction, divided into two lots and given as trust properties to the two respective communities. The second to the fifth appellants ('A2–A5'), who were the trustees for the Burmese lot, entered into a joint venture agreement with a developer to commercially develop their lot. The first appellant ('Five Star') was the joint-venture company formed to oversee and implement the development. The Burmese lot was later subdivided into two lots — one registered in Five Star's name and the other in the names of A2–A5. When Five Star filed proceedings to evict the second respondent ('R2') from its lot, R2 objected by saying the lot was part of land belonging to a public trust and that it could not be sold or transferred without the AG's consent. R2 then applied to, inter alia, set aside all the transfers of the respective lots into the names of the appellants. On discovering that the AG had consented to R2's setting-aside application, the appellants applied for leave to quash the said consent. The AG objected on the ground that his decision to give consent was non-justiciable. The High Court agreed and dismissed the appellants' leave application. On appeal, the COA disagreed with the High Court that the AG's consent was non-justiciable, but nevertheless dismissed the appellants' appeal on the ground the matters that were raised in their application were not determinable by affidavit evidence but required a full trial.

Held, unanimously dismissing Appeal No 58 and allowing Appeal No 59:

(1) The AG's power to give consent or otherwise under s 9(1) of the Government Proceedings Act 1956 was not absolute and was subject to legal limits. Unfettered discretion was contradictory to the rule of law (see para 83).

(2) The COA in Appeal No 58 did not err in holding that the AG's power to give or refuse consent under s 9(1) of the GPA was amenable to judicial review. It was settled law that the AG was a public officer under the Federal Constitution and art 145 gave ample power to the AG to represent the government or person performing any functions under the Constitution. The AG's discretionary power to give or refuse consent pursuant to s 9(1) of the GPA was derived from statute law and any restrictions and conditions applicable to statutory power could not be ignored (see paras 77–79).

(3) The court could not agree with the contention that the orthodox common law immunity from judicial review of the AG's prerogative powers as laid down in *Gouriet v Union of Post Office Workers* [1978] AC 435 was still good law in view of the House of Lords' decision in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. This latter landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. The judgment in *Gouriet*'s case was a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power. The present position was that the AG was no longer regarded as the sole guardian of what was public interest, which was a central principle in the decision in *Gouriet*'s case (see paras 57, 60 & 71).

[Bahasa Malaysia summary

Isu utama dalam dua rayuan di sini — yang mana adalah terhadap dua keputusan berasingan Mahkamah Rayuan ('MR') — adalah sama ada keputusan peguam negara ('PN') untuk memberikan atau menolak persetujuannya di bawah s 9 Akta Prosiding Kerajaan 1956 ('APK') berkaitan dua prosiding amanah adalah wajar dan boleh dikaji semula oleh mahkamah. Dalam rayuan pertama ('Rayuan No 58'), seorang pewasiat telah mewasiatkan dana dan tanah pemegang amanah di abwah amanah amal awam untuk membina, antara lain, pagoda untuk penyembahan penyembah dewa Buddha tertentu ('dewa tersebut') agar mereka boleh melaksanakan upacara keagamaan mereka. Apabila, selepas beberapa tahun, tiada apa yang dilakukan oleh pemegang amanah untuk malaksanakan hasrat pewasiat dan semua dana yang telah diperuntukkan bagi tujuan tersebut telah dibelanjakan, persatuan yang mewakili pengikut dewa tersebut memohon pembiayaan awam untuk membina pagoda tersebut. Oleh kerana pemegang amanah dana ingin persatuan tersebut menjadi pemegang amanah dana tersebut untuk memastikan projek itu diurus dengan baik, persatuan tersebut telah memohon persetujuan PN di bawah s 9(1) APK mengenai cadangan permohonannya kepada Mahkamah Tinggi untuk dijadikan pemegang amanah sebagai tambahan kepada atau sebagai pengganti pemegang amanah sedia ada kepada amanah tersebut. PN enggan memberikan persetujuannya. Responden memohon kebenaran mahkamah untuk memfailkan prosiding bagi membatalkan penolakan PN dan memerintahkannya untuk memberikan persetujuan. PN telah membantah permohonan kebenaran tersebut atas alasan penolakannya adalah tidak wajar. Mahkamah Tinggi tidak bersetuju dengan PN dan memberikan persatuan tersebut kebenaran untuk memfailkan semakan kehakiman. MR telah mengekalkan keputusan itu. Kedua-dua mahkamah telah memutuskan bahawa PN tidak mempunyai budi bicara mutlak untuk penolak persetujuannya kerana perkara itu bukan sahaja tidak

bersifat jenayah tetapi juga melibatkan kepentingan awam dan meninggalkan persatuan itu tanpa apa-apa bantuan atau remedi jika PN enggan memberikan persetujuannya.

Dalam rayuan kedua ('Rayuan No 59'), sebidang tanah yang tertakluk kepada amanah kepercayaan kekal dan amal untuk manfaat bersama komuniti Burma dan Thai di Pulau Pinang adalah, dengan sanksi mahkamah, dibahagikan kepada dua lot dan diberikan sebagai hartanah amanah kepada dua komuniti masing-masing. Rayuan-rayuan kedua hingga kelima ('A2–A5'), yang merupakan pemegang amanah untuk lot Burma, telah memasuki perjanjian usahasama dengan pemaju untuk membangunkan secara komersial lot mereka. Perayu pertama ('Five Star') adalah syarikat usahasama yang ditubuhkan untuk menyelia dan melaksanakan pembangunan. Lot Burma itu kemudian telah dibahagikan kepada dua lot — satu didaftarkan atas nama Five Star dan satu lagi atas nama-nama A2–A5. Apabila Five Star memfailkan prosiding untuk mengusir responden kedua ('R2') daripada lotnya, R2 membantah dengan mengatakan lot itu adalah sebahagian daripada tanah yang dimiliki oleh satu amanah awam dan bahawa ia tidak boleh dijual atau dipindahkan tanpa persetujuan PN. R2 kemudian memohon untuk, antara lain, mengetepikan semua pemindahan lot-lot masing-masing atas nama-nama perayu. Apabila mengetahui bahawa PN telah bersetuj dengan permohonan penepian R2, perayu-perayu telah memohon untuk kebenaran membatalkan persetujuan tersebut. PN telah membantah atas alasan bahawa keputusannya untuk memberikan persetujuan adalah tidak wajar. Mahkamah Tinggi bersetuju dan menolak permohonan kebenaran perayu-perayu. Atas rayuan, MR tidak bersetuju dengan Mahkamah Tinggi bahawa persetujuan PN adalah tidak wajar, tetapi walau apa pun telah menolak rayuan perayu-perayu atas alasan perkara-perkara yang ditimbulkan dalam permohonan mereka tidak boleh ditentukan oleh keterangan afidavit tetapi memerlukan perbicaraan penuh.

Diputuskan, sebulat suara menolak Rayuan No 58 dan membenarkan Rayuan No 59:

(1) Kuasa PN untuk memberikan persetujuan atau sebaliknya di bawah s 9(1) Akta prosiding Kerajaan 1956 tidak mutlak dan tertakluk kepada had undang-undang. Budi bicara yang tidak dikawal adalah bertentangan dengan rukun undang-undang (lihat perenggan 83).

(2) MR dalam Rayuan No 58 tidak terkhilaf kerana memutuskan bahawa kuasa PN untuk memberi atau menolak persetujuan di bawah s 9(1) APK boleh diterima untuk semakan kehakiman. Ia adalah undang-undang tetap bahawa PN adalah penjawat awam di bawah Perlembagaan Persekutuan dan perkara 145 memberikan kuasa yang mencukupi kepada PN untuk mewakili kerajaan atau orang yang melaksanakan apa-apa fungsi di bawah Perlembagaan. Kuasa budi bicara PN untuk meberi atau menolak persetujuan menurut s 9(1) APK

A diperoleh daripada undang-undang statut dan apa-apa sekatan dan syarat yang terpakai kepada kuasa statutori tidak boleh diabaikan (lihat perenggan 77–79).

(3) Mahkamah tidak bersetuju dengan hujah bahawa kekebalan ortodoks B common law daripada semakan kehakiman berhubung kuasa prerogatif PN sebagaimana dinyatakan dalam kes *Gouriet v Union of Post Office Workers* [1978] AC 435 masih undang-undang yang baik berdasarkan keputusan House of Lords dalam kes *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Penghakiman dalam kes C *Gouriet* adalah pandangan penolakan kehakiman terdahulu untuk menyiasat cara kuasa prerogatif dilaksanakan. Dengan kemajuan progresif semakan kehakiman, mahkamah telah lebih daripada bersedia untuk menyemak semula pelaksanaan kuasa bud bicara, sama ada yang diperolehi daripada statut atau kuasa prerogatif. Kedudukan kini adalah D bahawa PN tidak lagi dianggap sebagai penjaga tunggal untuk kepentingan awam, yang merupakan prinsip dalam keputusan kes *Gouriet* (lihat perenggan 57, 60 & 71).]

Notes

E For a case on extent of discretion, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 2497.

Cases referred to

A-G (Ex Rel Pesurohjaya Ibu Kota, Kuala Lumpur) v Wan Kam Fong [1967] 2 F MLJ 72 (refd)

Brown v Executors of the Estate of HM Queen Elizabeth the Queen Mother [2008] 1 WLR 2327, CA (refd)

Chng Suan Tze v Minister for Home Affairs [1988] 2 SLR(R) 525; [1988] SGCA 16, CA (refd)

G *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL (refd)

Gouriet v Union of Post Office Workers [1977] 2 WLR 310; [1978] AC 435, CA (not folld)

Law Society of Singapore v Tan Guat Neo Phyllis [2008] 2 SLR(R) 49; [2007] H SGHC 207, HC (refd)

London County Council v Attorney-General [1902] AC 165, HL (refd)

Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20, PC (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn I *Bhd* [1979] 1 MLJ 135, SC (refd)

R (on the application of B) v DPP (Equality and Human Rights Commission intervening) [2009] EWHC 106 (Admin); [2009] 1 WLR 2072, QBD (refd)

R (on the application of Bancoult) v Secretary of State for Foreign and

Commonwealth Affairs [2017] 1 All ER 403, SC (refd)
R (on the application of Gujra) v Crown Prosecution Service [2011] EWHC 472 (Admin); [2011] 2 Cr App R 130, QBD (refd)
R (on the application of the Campaign for Nuclear Disarmament) v Prime Ministe [2002] EWHC 2777 (Admin), QBD (refd)
R v Criminal Injuries Compensation Board, ex parte Lain [1967] 2 QB 864, QBD (refd)
R v DPP, Ex parte Duckenfield [2000] 1 WLR 55, QBD (refd)
R v Ministry of Defence, ex parte Smith [1995] EWCA Civ 23; [1996] QB 517, CA (refd)
R v Secretary of State for Home Department, ex parte Hosenball [1977] 1 WLR 766, CA (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Tan Seet Eng v Attorney-General [2016] 1 SLR 779; [2015] SGCA 59, CA (refd)
Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128, HC (refd)
The State v Ilori [1983] 1 SCNLR 94, SC (refd)
Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Haji Omar & Ors [1988] 3 MLJ 149, SC (refd)

Legislation referred to

Colonial Laws Validity Act 1865 [UK]
Federal Constitution art 145
Government Proceedings Act 1956 s 9, 9(1)
Immigration Ordinance 1971 [UK]
Post Office Act 1953 [UK] s 68
Rules of Court 2012 O 53

Appeal from: Civil Appeal Nos P-01(A)-421–10 of 2016 and P-01(A)-5–01 of 2017 (Court of Appeal, Putrajaya)

Shamsol Bolhassan (Rosli Ahmad with him) (Senior Federal Counsel, Attorney General's Chambers) in Civil Appeal No 01(f)-58–10 of 2017(P) for the appellant.
Karin Lim Ai Ching (A Suppiah with her) (Juli & Ameleena) in Civil Appeal No 01(f)-59–11 of 2017(P) for the appellants.
Ravi Chandran (SC Ravi & Assoc) in Civil Appeal No 01(f)-58–10 of 2017(P) for the respondent.
Shamsol Bolhassan (Rosli Ahmad with him) (Senior Federal Counsel, Attorney General's Chambers) in Civil Appeal No 01(f)-59–11 of 2017(P) for the first respondent.
Ravin Vello (Vello & Assoc) in Civil Appeal No 01(f)-59–11 of 2017(P) for the second respondent.

Balwant Singh (T Gunaseelan with him) (Balwant Singh & Co) in Civil Appeal No 01(f)-59–11 of 2017(P) for the third respondent.

Zawawi Salleh FCJ (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us, namely:

(a) Civil Appeal No 01(f)-58–10 of 2017(P) ('Civil Appeal No 58'); and

(b) Civil Appeal No 01(f)-59–11 of 2017(P) ('Civil Appeal No 59').

[2] This court had directed that both appeals be heard together. The leave questions in respect of which applications for leave to appeal were allowed in these appeals were in relation to the justiciability of the attorney general's consent or his refusal to give consent under s 9(1) of the Government Proceedings Act 1956 ('Act 359').

[3] The question of law in Civil Appeal No 58 is as follows:

> Whether the written consent given by the Attorney General under section 9(1) of the Government Proceedings Act 1956 in respect of civil cases is non-justifiable or non-reviewable.

[4] The question of law in Civil Appeal No 59 is as follows:

> Whether the consent given by the Attorney General under section 9(1) of the Government Proceedings Act 1956 in respect of civil cases is justifiable or reviewable.

[5] We heard both appeals together on 12 December 2018. After having heard the counsel representing the appellants and the respondents, and after having perused the records of appeal and the relevant case laws, we unanimously dismissed Civil Appeal No 58 and allowed Civil Appeal No 59. The reasons for so doing are set out below.

FACTUAL BACKGROUND AND THE ANTECEDENT PROCEEDINGS

[6] These cases have had a chequered history with a number of legal skirmishes. Therefore, it is necessary to narrate the facts at some length in order to appreciate and decide the leave questions posed.

[7] The factual background of these appeals have been sufficiently set out by both trial judges in their respective grounds of judgment. We will not repeat the

entire factual background save for those parts which are relevant to this judgment.

CIVIL APPEAL NO 58

[8] The parties in Civil Appeal No 58 are as follows:

The appellant:

The appellant is the Attorney General of Malaysia ('AG').

The respondent:

The respondent is the Secretary of the Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan ('the said association'). The said association comprises of followers of the Buddhist faith and devotees of the Deity Liam Hood Thong Chor Seng Thuan ('the said deity').

[9] One Cheah Leong Kean, deceased ('the testator') made a public charitable trust in his will that RM15,000 be given to his children Cheah Phin Kee, Cheah Phin Yeong and Cheah Phin Cheang ('the initial trustees') to construct a Pagoda and outhouses.

[10] Then by an indenture dated 6 March 1941, four parcels of land were transferred to the initial trustees and a further amount of RM5,000 to be invested and the income arising from such investments to be used to maintain the Pagoda for the benefit of all devotees professing the Buddhist faith and conducting Buddhist religious customs of the said deity.

[11] The four parcels of land referred to in para 10 are situated in Section 1, Georgetown, North East District, Penang ('the said lands'):

(a) Geran No 20348 Lot 491;

(b) Geran No 20349 Lot 492;

(c) Geran No 5935 Lot 292; and

(d) Geran No 20273 Lot 960.

[12] The initial trustees had failed to ensure that building works were carried out as per the terms of the trust and the trust funds were all spent. On 20 August 1982, Mustapha Hussain JC (as His Lordship then was) held in Penang Originating Summons No 387 of 1971 that a trust to construct a Pagoda is a public charitable trust and that the cy-pres doctrine be applicable.

[13] Since that order, the said lands have been vested in the names of Robert Teng Lye Hock (deceased), So Miau Song, Tai Chong, Yeow Teow Giap (deceased) and Tan Siew Joo ('the current trustees'). However, it was alleged that there has been no effort by the current trustees to carry out the wishes of the testator and the said lands have been left vacant.

[14] The said association had endeavoured to secure funding from third parties to build the Pagoda. However, as a pre-condition of the promised funds, it was necessary for the said association to be appointed as a trustee, to provide it with the requisite legal standing to execute agreements on behalf of the said trust.

[15] In view of the above, the said association had vide letters dated 20 November 2014 and 6 July 2015 applied to the AG for the consent under s 9(1) of Act 359 so that an application could be made to the High Court for the said association to be made a trustee in addition to or to replace the current trustees.

[16] The AG vide a letter dated 17 February 2016 rejected the said association's application on the ground that consent had been given to the current trustees on 15 March 2014. Dissatisfied with the decision, the respondent, acting in his capacity as the secretary of the said association, applied to the High Court at Penang for leave to commence judicial review for an order of certiorari to quash the decision of the AG dated 17 February 2016 and an order of mandamus to compel the AG to grant consent to the application. The AG objected to the leave application on the ground that the said refusal is non-justiciable.

[17] However, on 28 September 2016, the High Court allowed the respondent's application and granted leave to the respondent to commence judicial review proceedings. The High Court held as follows:

> [19] The submission by the senior federal counsel that 'the decision of the AG belongs to the AG' is untenable.
>
> [20] This court is of the considered opinion that the absolute discretion of the respondent (if at all it exists) is only pertaining to criminal offences whereas this case involves the discretion or authority of the respondent in a non-prosecutorial role hence it should not involve an unfettered discretion.

[18] The AG then appealed to the Court of Appeal against the decision of the High Court, but the same was dismissed. The Court of Appeal held that:

> [16] On this first issue, we wholly agreed with the learned SFC that the law does not require the attorney general to file any affidavit in reply at the leave stage. At the leave stage, the attorney general in this appeal was served not in his capacity as a

respondent but in his capacity as the attorney general under O 53 r 3(3) of the Rules of Court 2012 . He could choose not to appear but when he appeared, through the learned SFC, the court had no jurisdiction not to hear him. The court was not concerned with the merit of the application as the leave stage was merely to sieve out frivolous application and to see whether the applicant had an arguable case.

...

Issue III: The Attorney General's decision was justiciable?

[24] Next issue raised by the learned SFC was on non justiciability of the decision of the attorney general under s 9 of the GPA. He relied heavily on the House of Lord's case of *Gouriet v Union of Post Office Workers and others* [1977] 3 All ER 70; [1978] AC 435 especially on the following passage:

> ... the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney General.

[25] Learned counsel for the respondent submitted that *Gouriet*'s case, concerned a relator action in England and therefore the reliance on the case was misconceived. He relied on the case of *Teh Guat Hong*. Further the decision of the attorney general herein was not a decision made in a prosecutorial role and therefore should not involve unfettered discretion.

[26] We fully agreed with learned counsel for the respondent on this issue. In *Gouriet*, there was a proposed temporary union ban on communications to and from South Africa, which would have been criminal, and yet the attorney general had refused to sue or lend his name to a relator action. *Gouriet*, was concerned with the enforcement of the criminal law by way of an injunction in a civil suit. This is not the case with our instant appeal. The respondent herein did not file a suit to enforce the criminal law. His application was for a judicial review on the refusal of the attorney general to grant him consent to file a civil proceeding. Granted, it cannot be disputed that the attorney general has unfettered discretion in relation to prosecution of criminal offence based on art 145 of the Federal Constitution. However, there is no such unfettered discretion in a non-criminal matter like in this instant appeal.

[27] A matter is non-justiciable if the court has no authority to adjudicate over a dispute as justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. See *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo* [2014] 6 MLJ 812. We opined there cannot be any absolute discretion in civil law particularly when it involves public, as this can lead to abuse. This appeal in our considered view, obviously involved public interest. 35 years had lapsed and there still had been no effort by the existing trustee to carry out the wishes of the testator's will. On the face of s 9 of the GPA, the respondent cannot take action without the attorney general's consent. With the refusal of the attorney general, where else could the respondent turn to but the court. We opined, the law cannot be too rigid. To borrow the words of Lord Denning in the English Court of Appeal of *Gouriet v Union of Post Office Workers and others* [1977] QB 729, 'What is to be done about it? The courts to stand idly by? Is the attorney general the final arbiter as

A to whether the law should be enforced or not?' We were of the considered view, looking at the facts of this case, this was the appropriate situation for the court to exercise its judicial supervision.

B **[19]** Aggrieved with the decision of the Court of Appeal, the AG had applied for and obtained leave to appeal from the Federal Court on 16 October 2017. Hence, this appeal before us.

CIVIL APPEAL NO 59

C **[20]** The parties in Civil Appeal No 59 may be described as follows:

The appellants:

(a) the first appellant is the registered proprietor of a parcel of land known as D Lot No 10029, Section 4, Georgetown, North East District, Penang held under Geran No Hakmilik HSD 18532 ('Lot No 10029');

(b) the second to fifth appellants are the trustees of the Penang Burmese Trust Property for the welfare and benefit of the Burmese community in E Penang. The transfer of Lot No 10029 was effected by the second to fifth appellants to the first appellant; and

(c) the sixth appellant is the Vice-Chairman of the Penang Burmese Trust Property.

F The respondents:

(a) the first respondent is the AG;

(b) the second respondent is a Thai descendant and claims to be the owner of premises known as No 3, Burmah Lane, Penang ('the said premises'). The G said premises was erected on Lot No 10029. He is the plaintiff in the Penang High Court Originating Summons No 24NCVC-1128–12 of 2014 ('OS 1128'). The first to fifth appellants are the defendants in OS 1128; and

H (c) the third respondent claims to be of Burmese descent and he is the second plaintiff in OS 1128.

[21] The dispute herein revolves around a piece of land formerly known as Lot No 2103 held under Geran No 61390 ('Lot No 2103'). Lot No 2103 was I originally part of a land known as Lot No 104, Section 4, Georgetown, North East District, Penang held under Geran (First Grade) No 6719 ('Lot No 104'). Lot No 104 with a temple erected thereon was the subject matter of a religious and charitable trust created by the East India Company on behalf of Queen Victoria on 30 May 1845 for the benefit of the Burmese and Thai communities

in Penang, with no power to, inter alia, sell, transfer or otherwise alienate the land and it was to remain and continue for the benefit of such communities ('the Burmese-Thai Trust'). A

[22] The trustees of both Burmese and Thai communities had entered into an agreement to partition Lot No 104 which was later endorsed by a court order dated 19 October 1994 (made in Penang High Court Originating Summons No 24–665 of 1994). Pursuant to the court order, Lot No 104 was partitioned into two lots, namely: B

(a) Lot No 2102, to be taken by the trustees of the Thai community ('the Thai trust property'); and C

(b) Lot No 2103, to be taken by the trustees of the Burmese community ('the Burmese trust property').

[23] On 1 June 2000, the AG gave his written consent under s 9 of Act 359 and it was stated, inter alia, as follows: D

(a) that the AG consented to the commencement of a proceeding at the High Court at Penang to apply for the appointment of Trustees respectively for the Burmese community and the Thai community; E

(b) that Lot No 2102 be vested in the name of the trustees of the Thai community;

(c) that Lot No 2103 be vested in the name of the trustees of the Burmese community; and F

(d) the trust funds be divided equally between the trustees of the Burmese community and the trustees of the Thai community.

[24] Based on the said consent, the Thai-Burmese Trustees filed Penang High Court Originating Summons No 24–1209 of 2002. By way of an order dated 3 October 2002, the receiver of the Burmese-Thai Trust was discharged as the receiver and he was ordered to pay the sum of RM1,889,261.86 to the Burmese trustees and the sum of RM1,889,261.86 to the Thai trustees. G

[25] Based on the said order, the second to fifth appellants executed a trust deed dated 31 July 2006 stating that they have consented to be appointed as the Penang Burmese Trustees of the Burmese Community of Penang and Lot No 2103 would be held on trust by them. H

[26] The second to fifth appellants then entered into a joint venture agreement ('the JVA') dated 25 August 2006 with a developer known as Aimas Development Sdn Bhd to develop Lot No 2103 by constructing a three-storey shop-offices or other commercial buildings. The JVA was endorsed by a court I

order dated 31 October 2007 (made in Penang High Court Originating Summons No 24–376 of 2007). The first appellant was incorporated as a corporate joint venture vehicle to undertake the development of commercial properties.

[27] As Lot No 2103 was zoned as partly commercial and partly religious, the Georgetown City Council imposed a requirement that Lot No 2103 be subdivided for the purpose of submission of development plan on part of Lot No 2103. In July 2013, Lot No 2103 was subdivided into two lots known as Lot No 10029 (Geran No Hakmilik HSD 18532) and Lot No 10030 (Geran No Hakmilik HSD 18533). Lot No 10029 was issued under the name of the first appellant and Lot No 10030 was issued under the name of the second to fifth appellants.

[28] The first appellant then filed a legal action at the Sessions Court at Georgetown by way of Civil Suit No A52–144–08 of 2014 against the second respondent, seeking, inter alia, for vacant possession of the premises erected on Lot No 10029, damages and costs. On 31 July 2015, the suit was transferred to the Penang High Court and it was subsequently registered as Civil Suit No PA-22NCVC-34–02 of 2016. The said suit is pending hearing at the Penang High Court.

[29] In the statement of defense and counter claim, the second respondent averred that he need not deliver vacant possession of the said premises on ground that the land is part of the subject matter of a public trust under s 9 of Act 359 and therefore it could not be sold and transferred without the consent of the AG.

[30] Subsequent thereto, the second respondent filed OS 1128 against the first to fifth appellants and applied for, amongst others, the following reliefs:

(a) an order to set aside *ex debito justitae* the registration of the first to fifth appellants as the owners of Lot No 10029 and Lot No 10030 on the grounds of lack of jurisdiction and absence of consent from the AG under s 9 of Act 359;

(b) a permanent injunction to restrain the first to fifth appellants and their agents from acting as registered owners of the public trust properties;

(c) an order that the first to fifth appellants furnish statements of account of the Penang Burmese Trust Property to court; and

(d) an order that all monies which had been used by the trustees of the Penang Burmese Trust Property after 31 October 2007 in relation to

accounts of the Penang Burmese Trust Property be returned forthwith and deposited into court and then to the Burmese community in Penang.

[31] After filing OS 1128, the second respondent on 20 August 2015 wrote to the AG for his consent to proceed with the said OS. On 31 May 2016 the AG gave his written consent to the second and third respondents. Based on the said consent, the third respondent intervened in the proceedings and was added as the second plaintiff in OS 1128.

[32] The appellants, after having discovered that consent had been given to the second and third respondents, filed an ex parte application at the High Court for judicial review for an order of certiorari to quash the AG's consent dated 31 May 2016 and in the alternative, a declaration that the said consent is null and void. The appellants' challenge to the consent dated 31 May 2016 is premised on the following grounds:

(a) the AG had failed to take into consideration the relevant facts ie the events which had transpired and the orders which had been given by the High Court from year 1994 until year 2007 have not been set aside; and

(b) the second and third respondents, who are not of Burmese descent, have no locus to interfere into the affairs of the Penang Burmese Trust.

[33] At the hearing of the leave application, the AG had objected on the ground that decision of the AG to give consent is non-justiciable.

[34] The High Court upheld the AG's objection and dismissed the appellants' application with no order as to costs. The High Court held as follows:

> ... I agree with SFC's submission. The right to give or refuse consent is within the absolute discretion of the attorney general. In this case, the attorney general had exercised his discretion to give consent. The case law show the applicants cannot challenge the consent on whatever grounds. Therefore, there is no merits in the grounds relied upon by the applicants. The issue of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided by the courts in Suit 22NCVC-34–02 of 2016 and Originating Summons No 24NCVC-1128–12 of 2014. These issues cannot be resolved by way of judicial review. It is pre-mature at this stage for the applicants to ask the court to declare the Burmese Trust is a private trust. Each party should be given opportunity to prove its case.

[35] Being aggrieved with the decision of the High Court, the appellant then appealed to the Court of Appeal. On 12 April 2017, the Court of Appeal unanimously dismissed the appellant's appeal.

While the Court of Appeal disagreed with the High Court's decision that the AG's consent is non-justiciable, the Court of Appeal held:

> [16] However, looking back at the decision of the learned High Court judge we fully agreed with the learned High Court judge that the issues of whether the Burmese Trust is a public charitable trust or a private trust and who are entitled to Lot 10029 and the said premises are to be decided in Suit 22 No NCVC-34–02 of 2016 and OS 1128. The appellants in their judicial review application had sought, inter alia, for a declaration that the Penang Burmese Trust created under the trust deed dated 31 July 2006 is a valid private trust. We agreed with the learned High Court judge that it is premature to seek such a relief the issue cannot be resolved simply by way of judicial review. The issues raised require serious discussion and examination at a proper trial. Witnesses need to be called and each party to be given opportunity to ventilate the issue and for the court to evaluate. It cannot definitely be exercised by mere examination of the documents.

[36] Being dissatisfied with the decision of the Court of Appeal, the appellants had applied for and obtained leave from the Federal Court on 16 October 2017. Hence, this appeal before us.

ISSUE — JUSTIFIABILITY OF THE AG'S DECISION

[37] The central issue in these appeals is whether the court can review a decision of the AG in granting or refusing consent pursuant to s 9(1) of Act 359.

SUBMISSION OF THE AG'S CHAMBERS

[38] Learned senior federal counsel ('SFC') submitted that the Court of Appeal had erred in failing to appreciate and apply the legal principles laid down by the House of Lords in the case of *Gouriet v Union of Post Office Workers* [1978] AC 435 ('the *Gouriet*'s case') in holding that the decision of the AG under s 9(1) of Act 359 is amenable to judicial review.

[39] It was the contention of the learned SFC that although the *Gouriet*'s case concerns relator proceedings for the purpose of enforcing the criminal law by means of injunction, the Law Lords' comments are of more general relevance, in particular the alleged reviewability by the courts of the attorney general's prerogative powers. Our attention was drawn to Lord Wilberforce's judgment, at p 482 of the *Gouriet*'s case as follows:

> The Attorney-General's right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney-General can and the individual (absent special interest) cannot seek to enforce, and private rights, is fundamental in our law. To break it, as the plaintiff's counsel frankly invited us to do, is not a development of the law, but a destruction

> of one of its pillars. Nor, in my opinion, at least in this particular field, would removal of the distinction be desirable. More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make: see *Attorney-General v Bastow* [1957] 1 QB 514.
>
> This brings me to the second argument. Surely, it is said, since the whole matter is discretionary it can be left to the court. The court can prevent vexatious or frivolous, or multiple actions: the court is not obliged to grant an injunction: leave it in the court's hands. I cannot accept this either. The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.

[40] Learned SFC then referred us to the oft-quoted dictum by Viscount Dilhorne at pp 487–488 of the *Gouriet*'s case:

> The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.
>
> ... in my opinion the view that refusal of consent to a relator action is an exception to the general rule and is subject to review by the courts must be rejected. It is because I think it is undesirable that any judicial observations suggesting that the exercise by the Attorney-General of these functions and duties is subject to control, supervision and review by the courts should be left unanswered that I have ventured to make these observations.

[41] Learned SFC posited that the above dictum by Viscount Dilhorne is applicable in the appeals herein because the AG's decision on granting or refusing consent under s 9(1) of Act 359 is akin to the AG's consent to criminal prosecutions, where such consent is required by statute, a significant prerogative power of the AG. Learned SFC submitted that in the exercise of these powers the AG is not subject to control and supervision by the courts.

[42] In repudiating Lord Denning's view, the House of Lords in the *Gouriet*'s case specifically relied upon an obiter observation by Earl of Halsbury LC in *London County Council v Attorney-General* [1902] AC 165. In that case, Lord Halsbury had rejected the suggestion that the court could in any way impugn the exercise by the attorney general of his discretion whether or not to

A give his consent to the institution of relator proceedings. Lord Halsbury said:

> The initiation of the litigation, and the determination of the question whether it is proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.

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[43] In the same vein, Raja Azlan Shah J (as His Majesty then was) held in *A-G (Ex Rel Pesurohjaya Ibu Kota, Kuala Lumpur) v Wan Kam Fong* [1967] 2 MLJ 72:

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> It is conceded that the right of the attorney-general in the United Kingdom to bring such an action at the instance of a relator is derived from the common law and that *he has an unfettered discretion to determine whether he should bring such an action*. (Emphasis added.)

D **[44]** Learned SFC further contended that textbooks are replete with the statements to that effect. In *Halsbury's Laws of Malaysia* (Vol 3(1) 2015 Reissue), the learned authors said at pp 68–69:

> Under the English law, many Crown prerogative powers will not be reviewed by the courts on the grounds that they are not justiciable, such as the prerogative of entering into treaties, the defence of the realm, the granting of honours, the dissolution of Parliament and the appointment of ministers. Matters of national security are non-justiciable, provided that there is some evidence that national security is at stake. *Similarly, the courts will not review the exercise of the Attorney-General's discretion in deciding whether to bring relator proceedings*. (Emphasis added.)

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[45] Learned SFC also made reference to the book entitled *Judicial Review*, (3rd Ed London: Butterworths, 1992), by Michael Supperstone, James Goudie and Paul Walker and the learned authors had this to say at pp 129–130:

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> 7.12.3 The repositioning of the basis of judicial review by the House of Lords in *CCSU* enables us to offer a relatively simple approach to the question of unreviewable discretion... This leaves only one substantial ground of unreviewability: that the subject matter of the power is not justiciable because its policy content renders it unsuitable for adjudication. This may apply to statutory as well as to common law prerogative powers, and the ambit of the area of unreviewability is an issue better addressed in relation to judicial review as a whole. Here it is sufficient to make a number of brief general points.
>
> (1) ...

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I ...

> (5) An illustration of the last point is the powers of the Attorney-General. Dicta of the House of Lords in *Gouriet v Union of Post Officer Workers* that decision of the Attorney-General whether to consent to relator proceedings are not justiciable were not dependent on the categorisation of his powers as part of the prerogative and the

dicta were therefore not in terms affected by the decision in *CCSU*. The refusal to permit review of decisions by the Attorney-General may appear anomalous in the face of the courts' general readiness to intervene by judicial review in the area of administration of justice, but recent cases have affirmed the non-reviewability of other classes of decision of the Attorney-General, in acknowledgment of his role as guardian of the public interest and the sensitive policy content of his decisions.

[46] Learned SFC urged this court to hold that the AG's role as the guardian of public interest in considering whether to grant or otherwise his consent pursuant to s 9(1) of Act 359 should remain outside the court's jurisdiction. The rationale underpinning the SFC's submission is that the AG is accountable to Parliament and not to the courts. In support of his contention, learned SFC referred us to p 524 of the *Gouriet*'s case, where Lord Fraser of Tulleybelton put it as follows:

If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts.

[47] Moreover, it was the learned SFC's submission that AG is not a public officer or public authority within O 53 of the Rules of Court 2012. Based on the aforesaid reasons, learned SFC emphasised the continued relevance of the principles established in the *Gouriet*'s case and submitted that there is no rhyme nor reason for the Court of Appeal to disregard the principles laid down in the *Gouriet*'s case which conferred immunity from judicial review on the AG.

ANALYSIS AND FINDINGS

[48] It is trite that not all cases brought before courts are reviewable. Before proceeding to hear a case, a court must first examine, inter alia, its justiciability. 'Justiciability' concerns the limits upon legal issues over which a court can exercise its judicial authority. Non-justiciability in its administrative law sense signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief.

[49] The issue of justiciability in an application for leave for judicial review was considered in great detail by Mohamad Ariff Md Yusuf J (as he then was) in *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128:

A Non-justiciable Issues

In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a Court of Law, because the issue involved is not justiciable.

B

... The most prominent amongst non-justiciable issues are those which are known in the U.S.A. as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).

C The learned authors of *De Smith's Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, 'the fact remains, however, that there are some issues which are inherently unsuited to adjudication' and in this category of case, 'the Court acknowledges that the litigation process and the expertise of the Court are unsuited to resolving the question in hand' (at p 121).

D A good definition of 'justiciability' can also be found in Chris Finn, 'The Concept of 'Justiciability' in Administrative Law' in Groves & Lee, Australian Administrative Law (2007):

E The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non- justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role (at p 143).

F

[50] There are certain areas which the court is reluctant to delve into. These include the power of the state to enter into treaties and conduct of foreign G policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, the dissolution of Parliament and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts. One such instance is the case H of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) ('the *GCHQ* case').

[51] As we have alluded to earlier, the learned SFC appearing on behalf of the appellant in Civil Appeal No 58 and the respondent in Civil Appeal No 59 I placed emphatic reliance on the *Gouriet*'s case. This case is the seminal decision on relator proceedings. The brief facts of the case are these. On 13 January 1977, the general secretary of the Union of Post Office Workers ('UPW') announced on television that his union's executive committees had resolved to call on its members not to handle mails transmission between the United

Kingdom and South Africa for a week beginning 16 January 1977, as a protest against the apartheid police then in force in South Africa. Such interference with postal communications constituted an offence under s 68 of the Post Office Act 1953 (UK), which provides:

> If any person solicits or endeavours to procure any other person to commit an offence punishable on indictment under the Act, he shall be guilty of a misdemeanour and be liable to imprisonment for a term not exceeding two years.

[52] The news of this threat by the UPW to break the law and bring about the interruption of postal services to South Africa annoyed John Gouriet. On the following day (14 January 1977), he applied to Mr Sam Silkin, QC, the attorney general ('AG') for the latter's consent to a relator action for an injunction to refrain the UPW from calling the strike. Silkin QC had refused to consent and quite undeterred, Gouriet issued a writ in his own name (thus making himself — and not the AG — the plaintiff) against the UPW, seeking an injunction against the latter. Because this action would not be heard in time to prevent the imminent strike, Gouriet applied on the same day (14 January 1977) to Stockers J (in chambers) for an interim injunction matching the terms of the final injunction sought in the main substantive action. Stockers J dismissed the application on ground that he had no power to make the order requested. Stockers J was of the view that Gouriet had no locus standi to bring the main action, given the fact that the AG had refused to act as plaintiff in such an action.

[53] Mr Gouriet then appealed to the Court of Appeal ([1977] 2 WLR 310). Before the Court of Appeal, Silkin QC had followed convention by refusing to disclose the reasons for his decision on the ground that he was only accountable to Parliament. He further submitted that the court did not have jurisdiction to grant the interim injunction because only he, the AG, would have had the necessary standing to sue on behalf of the public.

[54] One of the main issues before the Court of Appeal was whether a court of law could review or override the effect of a refusal of consent by the AG, even where such refusal might have been based on corrupt motives or bad faith. Pronouncing upon the AG's discretion in regard to the matter of consent, Lord Denning said at p 328:

> It can be reviewed by the courts. If he takes into account matters which he ought not to take into account, or fails to take into account matters which he ought to take into account, then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirects himself in coming to his decision, the court can say 'Very well then. If you do not give your consent, or your reasons, we will hear the complaint of this citizen without it'.

[55] The proposition that the Gouriet was entitled to maintain an action for injunction in his own right was, on the other hand, rejected by Lawton and Ormrod LJJ. Both Their Lordships also emphatically acknowledged that the AG could not be compelled either to give his consent to a relator action, or to disclose his reasons for refusing such consent.

[56] By the time the case reached the House of Lords, Gouriet had abandoned his claim that the AG's decision was improper or that it could be reviewed by the court. Nevertheless, after ruling that the Court of Appeal had no power to grant him an interim injunction, Their Lordships (Lord Wilberforce, Viscount Dilhorne, Lord Diplock, Lord Edmund-Daview, Lord Fraser of Tullybelton) emphatically and unanimously rejected Lord Denning's view that the court had the power to review the AG's decision and upheld Silkin QC's contention that he was accountable to the public only through Parliament.

[57] With respect, we are unable to agree with the learned SFC that the orthodox common law immunity from judicial review of the AG's prerogative powers laid down in the *Gouriet*'s case is still good law in view of the House of Lords decision in the *GCHQ*'s case. The judgment in the *Gouriet*'s case is a reflection of past judicial refusal to enquire into the way in which a prerogative power had been exercised. With the progressive development of judicial review, the courts have been more willing to review the exercise of discretionary power, whether derived from statute or a prerogative power.

[58] The brief facts of the *GCHQ* case are these: The respondent had, in exercise of her prerogative powers conferred upon her by the Civil Service Order in Council 1982, changed the terms of service of the intelligence officers at the Government Communications Headquarters (GCHQ) by banning them from joining trade unions, citing national security concerns. The union then sought judicial review of the decision on the ground of unfairness. It was the unions' contention that the courts could review the decision despite it having been made under prerogative powers, something that was previously considered to be not examinable by the courts. They claimed that the government had not consulted the workers, and therefore there was a ground (procedural unfairness) for judicial review since a legitimate expectation of prior consultation had been established.

[59] In an affidavit, the Secretary to the Cabinet claimed that prior consultation could have disrupted and exposed vulnerable areas of GCHQ's operations. The House of Lords accepted the respondent's explanation that the requirements of national security outweighed those of fairness. The House of Lords accepted that national security concerns are the purview or the executive, and a question regarding national security is considered to be unjusticiable.

However, Their Lordships held that the respondent's decision would have otherwise been vitiated by her failure to consult, and would have been amenable to judicial review even though she acted by virtue of a prerogative power. In his judgment, Lord Scarman after having referred to the authorities of *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864 (DC) and *R v Secretary of State for Home Department, ex parte Hosenball* [1977] 1 WLR 766 (CA), stated at p 407 that the modern law of judicial reviews had overwhelmed the old restrictions on the justiciability of the prerogative:

> The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power .. Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.

[60] This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at p 401D of the *GCHQ* case enunciated three classic grounds for judicial review:

> Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety ...
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> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can now succinctly be referred to as 'Wednesbury unreasonableness' *(Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in it defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it.
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[61] The prerogative powers of the AG were not expressly considered in the *GCHQ* case. However, the necessary implication of the decision is that these

powers (once considered unreviewable) are now potentially open to judicial scrutiny by the courts, except for a list of prerogatives that Lord Roskill categorised as being non-reviewable 'because their nature and subject matter are such as not to be amenable to the judicial process'.

[62] Writing in *Public Law* in January 2010, Sir Louis Blom-Cooper QC and Richard Drabble QC, revisited the *GCHQ* case, calling it the '*locus classicus* of a modern public law' and noting that it 'effectively buried the old concept of the prerogative power was unreviewable judicially' (see Sir Louis Blom-Cooper and Richard Drabble, 'GCHQ revisited', *Public Law*, January 2010, pp 18–24).

[63] Subsequent cases show that this list has largely been accepted, and there is indication that judges have continued to move with a degree of circumspection, and even in reaction against such development (see Leyland & Anthony, 'Express and Implied Limits on Judicial Review: Ouster and Time Limit Clauses, the Prerogative Power, Public Interest Immunity', *Textbook on Administrative Law* (6th Ed, Oxford University Press 2009 pp 392–437 at 414). However, in the case of *R (on the application of the Campaign for Nuclear Disarmament) v Prime Ministe* [2002] EWHC 2777 (Admin); ILDC 662 (UK 2002), Lord Maurice Kay accepted that the ambit of the 'forbidden areas', identified by Lord Roskill in the *GCHQ* case is not immutable, and had been reduced in some cases (para 50).

[64] The attitude of the courts in the United Kingdom is summarised in the obiter comments of Lord Justice Simon Brown in *R v Ministry of Defence, ex parte Smith* [1995] EWCA Civ 23; [1996] QB 517 at p 539:

> To my mind only the rarest cases today be ruled strictly beyond the court's purview — only cases involving national security properly so called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue.

[65] The case of *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2017] 1 All ER 403, ('*Bancoult (No 2)*') concerned a challenge to the UK government's decision not to repatriate inhabitants of the Chagos Archipelago, a group of about 60 islands in the Indian Ocean. Originally a French possession (and leper colony), it was ceded to Britain after Napoleon's defeat in 1814. The Archipelago was turned into a separate territory (the British Indian Overseas Territory) in 1965 and depopulated in order to make room for a US military base on the Archipelago's chief island, Diego Garcia. All this was achieved through the exercise of prerogative powers — first the BIOT Order 1965 and then the Immigration Ordinance 1971, which gave the newly established BIOT Commissioner the

authority (in colonial boilerplate) to 'make laws for the peace, order and good government of the territory'. A

[66] One of the issues before the House of Lords concerned the general question of the reviewability of prerogative legislation. The Law Lords unanimously ruled that judicial review applied. While it is true that prerogative Orders in Council are a type of primary legislation they said, it does not follow that they share all the characteristics of Acts of Parliament, in particular their immunity from judicial review. B

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[67] Lord Hoffman said at para 35:

> The fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality, although it may be legislative in character, it is still an exercise of power by the executive alone. D
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> ...
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> I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action. E

[68] The House did, however, rule that the orders evicting the inhabitants were lawful, primarily due to the interdiction of the Colonial Laws Validity Act 1865. F

[69] We also make reference to the case of *Brown v Executors of the Estate of Her Majesty Queen Elizabeth the Queen Mother* [2008] 1 WLR 2327. The brief facts of that case are these: following the death in 2002 of Princess Margaret and the Queen Mother, litigation was brought by a Mr Andrew Brown who claimed to be an illegitimate son of the late Princess Margaret. He also sought to inspect the Will of the late Queen Mother. It appears that the general practice is that Royal Wills are sealed. G

H

[70] The Court of Appeal held that a private individual was entitled, in public interest, to have a substantive hearing of his claim to inspect the Wills of members of the Royal family. Lord Phillips MR observed at para 38:

> The conclusion (of the House of Lords in Gouriet's case) that, in the absence of the consent of the Attorney-General, Mr Gouriet was barred from pursuing the proceedings was based the analysis of the statutory provisions in issue. By contract, there is nothing on the face of section 124 of the Supreme Court Act 1981 to suggest that the court may only exercise its powers under it on an application by the Attorney-General. I

[71] The decision of the case above would suggest that the decision in *Gouriet*'s case is no longer good law and that the basis upon which it was decided no longer prevail. The present position is the AG is no longer regarded as the sole guardian of what is public interest, which was a central principle of the decision in the *Gouriet*'s case.

[72] It is interesting to note that in England private individuals may now properly seek judicial review of decisions of the public prosecutor whether or not to initiate criminal proceedings. This power does not exist at the time of the judgment in the *Gouriet*'s case. In *R (on the application of B) v DPP (Equality and Human Rights Commission intervening)* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072, it was held at p 52:

> The exercise of the Court's power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the prosecution's case in the usual way through the criminal court) but is still exceptional.

[73] The courts in England have consistently held that private individuals may seek judicial review of decisions of the public prosecutor not only in matters of initiation or failure to take court proceedings or to discontinue police investigations, but additionally of decisions whether to take over or discontinue ongoing private investigations (see *R v DPP, Ex parte Duckenfield* [2000] 1 WLR 55 per Laws LJ at pp 67–68 and *R (on the application of Gujra) v Crown Prosecution Service* [2011] EWHC 472 (Admin); [2011] 2 Cr App R 130 at para 147).

[74] The legal principle propounded in the *GCHQ* case enjoy considerable support from the decision of a very strong bench of Law Lords sitting as the Judicial Committee of the Privy Council in the case of *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20 (25 April 2000). In that case, the Mauritian Director of Public Prosecutions ('DPP'), who enjoys similar prosecutorial powers to the English AG, filed a *nolle prosequi* and terminated the proceeding each time the appellant tried to bring a private prosecution against a senior politician. The appellant requested leave to apply for judicial review from the Supreme Court of Mauritius but the court upheld the DPP's argument that the effect of the decision in the *Gouriet*'s case was that the exercise of the DPP's powers was not amenable to judicial review.

[75] However, on appeal to the Privy Council, the DPP, in an apparent attempt to avoid the adverse implication of the *GCHQ* case for the *Gouriet*'s precedent, supported the decision of the Supreme Court by relying less on the source of the power to enter a *nolle prosequi* than on the nature of the decision to enter one. Relying on the Supreme Court's decision in *The State v Ilori*

[1983] 1 SCNLR 94 — that the controlling factor in determining whether the exercise of prerogative power is justiciable is its subject matter — the DPP contended that a prosecutorial decision 'involves the assessment of factors which the courts cannot and should not seek to review'. The Privy Council emphatically rejected this contention, and refused to disturb what it described as 'the ordinary assumption that a public officer exercising statutory functions is amenable to judicial review'. Lord Bingham, who delivered the judgment, indicated at para 14 that Viscount Dilhorne's dictum in the *Gouriet*'s case could now be 'reviewed or modified in the light of the later decision of the House of Lords in the *GCHQ* case'.

[76] Singapore's courts have repeatedly affirmed that all powers are subject to legal limits. In *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525; [1988] SGCA 16 at para 86; *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779; [2015] SGCA 59, paras 1–2), the courts held thus: 'under the law, the AG'S discretionary power is not absolute and he must act according to law, as his prosecutorial power is subject to legal limits. Prosecutorial discretion cannot be exercised in bad faith, or in a manner contrary to the quality guaranteed under Article 12 of the Constitution' (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 49; [2007] SGHC 207 at para 148).

[77] Reverting back to our present appeals, we have carefully considered the judgment of the Court of Appeal in Appeal No 58 while keeping in mind the principles of law on the subject as propounded by the courts in other jurisdiction. We found there was no flaw in its reasoning in holding that the power of the AG to give or refuse consent under s 9(1) of Act 359 is amenable to judicial review. We are in total agreement with the Court of Appeal's reasoning as alluded to earlier in para 18.

[78] On the issue whether attorney general is a public officer, we are of the view that the matter has been settled by the decision of Supreme Court in *Tun Dato Haji Mohamed Salleh bin Abas v Tan Sri Dato Abdul Hamid bin Haji Omar & Ors* [1988] 3 MLJ 149 (SC) where it was held that AG is indeed a public officer under the Federal Constitution and art 145 gives ample power to the AG to represent the government or person performing any functions under the constitution.

[79] The AG's discretionary power to give or refuse consent pursuant to s 9(1) of Act 359 derives from a statute law and any restrictions and conditions applicable to statutory power cannot be ignored.

[80] In this context, it is useful to reproduce Professor Edwards' opinions on the issue of justiciability of the statutory prosecutorial powers of the attorney general, which was approved by the Privy Council in *Mohit*. According to him:

> Since the source of the discretionary power rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked such as arise with respect to the prerogative powers of the Law Officers of the Crown. Most of the celebrated cases which have been concerned with the reviewability of the Attorney-General's decisions fall within this latter category ... These powers derive from the prerogative authority vested in the Attorney-General and must be carefully distinguished from the discretionary powers that owe their origin to the actions of Parliament and which are to be found embedded in the long list of statutory provisions.

(See John Llewelyn Jones Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, London 1984) pp 29–30).

[81] Before concluding the present appeals, we would like to reiterate the important pronouncement in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561. In this case, the Federal Court emphatically declared that the power of judicial review 'cannot be changed or altered by Parliament by way of a constitutional amendment'. The court further stated, 'The power of judicial review is essential to the constitutional role of the courts, and inherent in basic structure of the constitution'. The Federal Court's reassertion of constitutional judicial power and its status as superior court meant that the power of the AG to grant or refuse consent under s 9(1) of Act 359 is amenable to judicial review.

[82] In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, Raja Azlan Shah CJ (Malaya) (as His Majesty then was) said at p 148:

> Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (ante) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Danckwerts LJ in *Bradbury v London Borough of Enfield*).

[83] We hasten to add that unfettered discretion is contradictory to the rule

of law. Therefore, the AG's power to give consent or otherwise under s 9(1) of Act 359 is not absolute and is subject to legal limits.

[84] In the same vein, the Singapore Court of Appeal in *Chng Suan Tze v Minister for Home Affairs* said at para 86:

> In our view, the notion of a subjective or unfettered discretion was contrary to the rule of law. All powers has legal limits and the rule of law demands that courts should be able to examine the exercise of discretionary power.

[85] For all the reasons given above, we would answer the leave question in Civil Appeal No 58 in the negative and the leave question in Civil Appeal in No 59 in the affirmative. Consequently, we dismissed the appellant's appeal in Civil Appeal No 58 and we allowed the appellants' appeal in Civil Appeal No 59. No order as to costs. So ordered.

Order accordingly.

Reported by Ashok Kumar